

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

DANNY LOUIS MUSGROVE,  
*Petitioner.*

No. 2 CA-CR 2020-0050-PR  
Filed June 25, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION  
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

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Petition for Review from the Superior Court in Pima County  
No. CR20061370  
The Honorable Howard Fell, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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Danny Musgrove, Tucson  
*In Propria Persona*

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

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B R E A R C L I F F E, Judge:

¶1 Danny Musgrove seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Musgrove has not shown such abuse here.

¶2 After a jury trial, Musgrove was convicted of first-degree murder, conspiracy to commit first-degree murder, and two counts of endangerment. The trial court imposed concurrent terms of life in prison for murder and conspiracy, to be followed by consecutive 2.25-year prison terms for endangerment. On appeal, we vacated his conviction and sentence for conspiracy, but otherwise affirmed his convictions and sentences. *State v. Musgrove*, 223 Ariz. 164 (App. 2009). He sought and was denied post-conviction relief, and this court denied relief on review. *State v. Musgrove*, No. 2 CA-CR 2011-0001-PR (Ariz. App. Apr. 4, 2011) (mem. decision). In 2016, Musgrove again sought and was denied post-conviction relief, but did not seek review of that decision.

¶3 In June 2019, Musgrove filed a notice of post-conviction relief requesting that counsel be appointed and identifying claims of ineffective assistance of counsel, newly discovered material facts, and actual innocence. He included with his notice a short explanation of his claims, contending the location where detectives had found a bullet was

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<sup>1</sup> Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). “Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.” *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. App. June 9, 2020) (“amendments apply to all cases pending on the effective date unless a court determines that ‘applying the rule or amendment would be infeasible or work an injustice’” (quoting Ariz. Sup. Ct. Order R-19-0012)).

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inconsistent with the state's theory of the case, DNA evidence had been planted on that bullet, and the victim had been moved. With regard to ineffective assistance of counsel, Musgrove asserted that trial counsel had not been diligent in investigating his case, that appellate counsel should have filed a motion to vacate the judgment, and that Rule 32 counsel did not "request that the bullet be examined by an independent expert," attach to his petition letters from his appellate counsel about a motion to vacate the judgment, or reply to the state's response. He also claimed the state had committed misconduct by withholding evidence.

¶4 The trial court denied Musgrove's request for counsel and set a deadline for a "supplemental brief." Musgrove then filed a motion seeking disclosure of certain items, which the court denied. He followed with a "Motion for Production," requesting various court records and evidence. Musgrove included with that motion a "supplemental brief," in which he recounted some of the trial evidence.

¶5 The trial court denied the production request and directed the state to respond to Musgrove's arguments. In his reply to that response, Musgrove characterized his claims as falling under Rule 32.1(e), (f), and (h). The court summarily dismissed the proceedings, noting Musgrove's claim regarding appellate counsel and his actual innocence claim had previously been raised and rejected. The court also noted that Musgrove's claim based on newly discovered evidence was "not properly raised or discernable" in his petition. This petition for review followed the court's denial of Musgrove's motion for rehearing.

¶6 On review, Musgrove contends that the trial court erred in concluding the bases of his argument had already been raised and rejected in previous proceedings and that the court erred in rejecting his requests for disclosure. He repeats four claims of ineffective assistance of counsel and what appears to be a claim of actual innocence under Rule 32.1(h), again asserting there was fabricated evidence in his case.<sup>2</sup>

¶7 The trial court did not err by summarily dismissing Musgrove's petition. His claims of ineffective assistance cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.4(b)(3)(A); *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance claim raised under Rule 32.1(a)). And his claim of actual innocence was raised and

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<sup>2</sup> Musgrove appears to have abandoned his claims of newly discovered evidence and prosecutorial misconduct.

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rejected in his prior proceeding and is thus precluded. Ariz. R. Crim. P. 32.2(a)(2). And, even were his current claim under Rule 32.1(h) distinguishable from his previous claim, he has not explained his failure to raise it in his previous proceedings. *See* Ariz. R. Crim. P. 32.2(b) (to raise claim under Rule 32.1(h), defendant required to “explain the reasons for not raising the claim in a previous notice or petition”).

¶8 Musgrove also asserts the trial court erred in denying his motion to compel disclosure. A defendant may be entitled to discovery in a Rule 32 proceeding by demonstrating a “substantial need” for the evidence before filing a petition, or by showing “good cause” after filing a petition. Ariz. R. Crim. P. 32.6(b)(1)-(2); *see also* *Canion v. Cole*, 210 Ariz. 598, ¶¶ 10, 18 (2005). As we have explained, Musgrove has not identified in his notice or petition any claim that can be raised in this untimely and successive proceeding—his only claims are untimely or have already been decided. There was no reason for the court to allow additional discovery.

¶9 We grant review but deny relief.